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UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

11 In re:

12 PHILIP ANDREW MACKEN,
 13 Debtor.

Case No. 23-50950-hlb
 Chapter 13

JOINT MOTION TO APPROVE
 COMPROMISE UNDER RULE 9019

14 Hearing Date: April 30, 2024
 Time of Hearing: 2:30 p.m.

15 Judge: Hon. Hilary L. Barnes

17 Kathryn Silverton, as trustee and beneficiary of the Loretta M. Kuhn Revocable Trust
 18 (“Silverton”), by and through counsel of record, and Philip Andrew Macken (“Debtor”) by and
 19 through counsel of record (together referred as the “Parties”), hereby submit this Joint Motion to
 20 Approve Settlement Agreement (“Motion”), asking the Court to approve a Global Settlement
 21 Agreement and Release (the “Settlement Agreement”) reached between Debtor, Silverton, and the
 22 Loretta M. Kuhn Revocable Trust, attached as Exhibit 1 to Silverton’s declaration.¹

23 In summary, the Settlement Agreement provides for a nearly fifty percent (50%) recovery
 24 for the Loretta M. Kuhn Revocable Trust and complete resolution of Silverton’s claims against

26 ¹ Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code,
 27 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
 28 Federal Rules of Bankruptcy Procedure will be referred to as “FRBP.” The Local Rules of Practice
 for the United States Bankruptcy Court for the District of Nevada shall be referred to as the “Local
 Rules”.

1 Debtor that would otherwise be nondischargeable. The Settlement Agreement also provides a
2 mutual release between the Parties, allowing Debtor to obtain a fresh start. The Settlement
3 Agreement will also ensure that all creditors will receive a 100% distribution on their claims
4 through Debtor's Chapter 13 Plan. As such, there is little if any negative impact on the bankruptcy
5 estate.

6 This Motion is supported by the Memorandum of Points and Authorities herein; the
7 declaration of Rebecca F. Zipp, Esq. ("Zipp Decl.") filed concurrently herewith pursuant to
8 LR 9014(c); the Debtor's Response to Silverton's Motion For Relief From the Automatic Stay,
9 ECF No. 44, incorporated by reference herein, the papers and pleadings on file in this bankruptcy
10 Case, judicial notice of which is respectfully requested pursuant to FRE 201(b) and (c) and 1101(a)
11 and (b); any oral argument the Court may entertain at hearing on the Motion; and any further
12 evidence and argument the Court may take in the event the Court sets an evidentiary hearing on
13 the Motion.

14 **MEMORANDUM OF POINTS AND AUTHORITIES**

15 **I. STATEMENT OF FACTS**

16 1. On December 15, 1989, Loretta M. Kuhn (the "Settlor"), established the Loretta M.
17 Kuhn Revocable Trust (the "Trust"). *See* Zipp Decl. ¶ 4.

18 2. On March 17, 2011, the Settlor amended and restated the Trust in its entirety. *See*
19 Zipp Decl. ¶ 5.

20 3. On November 30, 2011, the Settlor amended the Trust by executing a First
21 Amendment and a Second Amendment. *See* Zipp Decl. ¶ 6.

22 4. The restated Trust, together with the First Amendment and Second Amendment,
23 collectively, (the "Trust"), is domiciled in San Diego County, California. *See* Zipp Decl. ¶ 7.

24 5. Debtor was appointed successor trustee to the Trust on or around February 2018
25 after the Settlor was no longer able to manage her affairs. *See* Zipp Decl. ¶ 8.

26 6. As successor trustee, Debtor sold Settlor's primary San Diego residence for
27 approximately \$1,000,000.00, ostensibly to fund her residence at Country Gardens, a retirement

28

1 community located in San Diego County. Debtor paid a total of approximately \$170,000.00 of
2 Trust res to Country Gardens until Settlor passed away in June 2020. *See Zipp Decl.* ¶ 9.

3 7. In August 2020, Silverton sought an explanation from Debtor as to a discrepancy
4 in the Trust's assets because there were no funds remaining in the Trust from the sale of the San
5 Diego residence. Debtor did not provide a satisfactory explanation. *See Zipp Decl.* ¶ 10.

6 8. In January 2021, Silverton demanded an accounting from Debtor in an effort to
7 obtain more information because of the unexplained discrepancy. Debtor has never provided an
8 accounting. *See Zipp Decl.* ¶ 11.

9 9. Silverton retained the law firm of Seltzer Caplan McMahon Vitek, which sent
10 Debtor a demand letter in March 2021, demanding, among other things, an accounting. No such
11 accounting was ever provided in response to said demand letter. *See Zipp Decl.* ¶ 12.

12 **SAN DIEGO LITIGATION**

13 10. In June 2021, Silverton initiated the San Diego Litigation in the Superior Court of
14 the State of California in and for the County of San Diego Probate Department. *See Zipp*
15 *Decl.* ¶ 13.

16 11. On February 4, 2022, the San Diego Superior Court granted Silverton's order for
17 Debtor, as then-existing trustee of the Trust, to account for his administration of the Trust and to
18 file his account with that court. In defiance of that lawful court order, no such accounting was ever
19 provided to the San Diego Superior Court. *See Zipp Decl.* ¶ 14.

20 12. In April 2022, Debtor resigned as trustee of the Trust. To date, no accounting has
21 been provided either to Silverton or to the San Diego Superior Court. *See Zipp Decl.* ¶ 15.

22 13. In May 2023, Silverton propounded discovery on Debtor in the San Diego
23 Litigation, to which Debtor provided only partial responses in June and July 2023. Silverton
24 ascertained from those responses that, by transferring hundreds of thousands of dollars from the
25 Trust into personal bank accounts controlled by Debtor and held for his benefit, Debtor had likely
26 committed, among other things, financial elder abuse in violation of California law. Debtor
27 subsequently provided further discovery responses in or around November 2023. *See Zipp*
28 *Decl.* ¶ 16.

1 14. On July 6, 2023, Silverton filed a *First Amendment to Petition For: (1) Accounting,*
2 (2) *Removal of Trustee and Appointment of Successor Trustee,* (3) *Surcharge of Trustee,* (4)
3 *Appointment of Temporary Trustee,* (5) *Recovery of Trust Property From Trustee;* (6) *Financial*
4 *Elder Abuse;* (7) *Damages under Prob. Code §859; and Attorneys' Fees and Costs* in the San
5 Diego Litigation (the “Amended Petition”). *See Zipp Decl. ¶ 17.*

6 15. On July 7, 2023, Debtor executed a Quitclaim Deed to the benefit of his wife,
7 Dolores Webb Macken ostensibly conveying his entire interest in his residence at 1440 Stonegate
8 Court, Gardnerville, Nevada 89410 (“Debtor’s Residence”) for no consideration. *See Zipp*
9 *Decl. ¶ 18.*

10 16. On July 31, 2023, the San Diego Superior Court conducted a one-day trial on the
11 issue of Debtor’s breach of fiduciary duty. The evidence adduced at trial showed that Debtor had
12 transferred approximately \$660,000.00 to himself, ostensibly for his trustee fees. A ruling on this
13 first trial is pending. *See Zipp Decl. ¶ 19.*

14 17. In September 2023, the San Diego Superior Court issued a Temporary Protective
15 Order, enjoining Debtor from transferring substantial assets, including funds in various bank
16 accounts and his real property in Nevada. *See Zipp Decl. ¶ 20.*

17 18. In October 2023, Dolores Webb Macken executed a Quitclaim Deed ostensibly
18 conveying her purported interest in the Debtor’s Residence to herself and Debtor as Joint Tenants
19 with the Right of Survivorship. *See Zipp Decl. ¶ 21.*

20 19. On October 19, 2023, Silverton filed her First Amended Complaint in the Ninth
21 Judicial District of the State of Nevada, Douglas County (the “Douglas County Litigation”),
22 asserting claims for fraudulent transfer and fraud against Debtor. *See Zipp Decl. ¶ 22.*

23 20. Also in October 2023, Silverton recorded a *lis pendens* against Debtor’s Residence
24 to prevent Debtor from further obfuscating title in anticipation of an adverse judgment. *See Zipp*
25 *Decl. ¶ 23.*

26 21. In August 2023, the San Diego Superior Court scheduled a second trial date for
27 December 18, 2023, to hear the remaining issues raised for the first time in Silverton’s Amended
28 Petition. *See Zipp Decl. ¶ 24.*

H O L L E Y D R I G G S

1 22. The San Diego Superior Court held a Trial Readiness Conference on December 8,
2 2023. *See Zipp Decl.* ¶ 25.

3 23. On December 14, 2023, Debtor filed for Chapter 13 relief. *See ECF No. 1.*

4 24. Debtor listed Silverton and the Loretta M. Kuhn Revocable Trust as creditors with
5 disputed claims against the estate. *See Schedule E/F ECF No. 1,* ¶¶ 4.20, 4.22.

6 25. As a result of Debtor's bankruptcy filing, the San Diego Superior Court took the
7 December 18 trial off calendar and set for status conference the San Diego Litigation for February
8 2, 2024. *See Zipp Decl.* ¶ 28.

9 26. The San Diego Superior Court informed Silverton that it would reschedule the trial
10 at the February status conference should Silverton obtain relief from the automatic stay before the
11 February status conference. *See Zipp Decl.* ¶ 29.

12 27. The next status conference in the San Diego Litigation is set for October 4, 2024.
13 *See Zipp Decl.* ¶ 30.

14 28. On February 6, 2024, Silverton filed her Motion for Relief from the Automatic Stay
15 to Proceed with Litigation in San Diego Superior Court Probate Department and for Waiver of
16 14-Day Stay Under FRBP 4001(a)(3). *See ECF No. 33.*

17 29. On February 8, 2024, Silverton filed her Proof of Claim in the amount of
18 \$2,180,000.00. *See Claim No. 15.*

19 30. On March 6, 2024, the Parties executed the Settlement Agreement, which
20 memorializes the terms of a global settlement and resolves multiple pending and future litigation
21 among and between Silverton, the Trust, and Debtor. *See Zipp Decl.* ¶ 33.

22 31. The terms of the Settlement Agreement are as follows:

23 a. Debtor will market and sell his residence located at 1440 Stonegate,
24 Gardnerville, Nevada 89410 (the "Property") for \$2,498,000.00;

25 b. Silverton will file a Proposed Order Approving the Global Settlement
26 Agreement with the San Diego Superior Court;

27 c. Regardless of the sale amount, \$874,000.00 in sale proceeds will remain in
28 escrow and will be paid directly to Silverton upon further order of the Court;

1 d. Silverton will retain a \$126,000.00 deficiency claim that will be paid
 2 through Debtor's Chapter 13 plan on a pro rata distribution;

3 e. Silverton will dismiss with prejudice the San Diego Litigation against
 4 Debtor and Douglas County Litigation against Debtor and Debtor's wife;

5 f. Silverton and Debtor will mutually release each other from any and all
 6 claims, demands, causes of action, and attorneys' fees.

7 See Zipp Decl. ¶ 34.

8 II. ANALYSIS

9 Federal Rule of Bankruptcy Procedure 9019(a) provides:

10 On motion by the trustee and after notice and a hearing, the court
 11 may approve a compromise or settlement. Notice shall be given to
 12 creditors, the United States trustee, the debtor, and indenture trustees
 13 as provided in Rule 2002 and to any other entity as the court may
 14 direct.

15 In approving a proposed settlement, the Ninth Circuit has identified four factors a Court
 16 must consider:

17 (a) The probability of success in the litigation; (b) the difficulties, if
 18 any, to be encountered in the matter of collection; (c) the complexity
 19 of the litigation involved, and the expense, inconvenience and delay
 20 necessarily attending it; (d) the paramount interest of the creditors
 21 and a proper deference to their reasonable views

22 See *Martin v. Kane (In re A&C Properties)*, 784 F.2d 1377, 1381 (9th Cir. 1986) (citations
 23 omitted), cert. denied, *Martin v. Robinson*, 479 U.S. 854 (1986). Bankruptcy courts have great
 24 latitude to approve a settlement where the proposed settlement is "fair and equitable." See *In re*
 25 *Cini*, No. 10-62715-13, 2011 WL 4703022 at *4 (Bankr. D. Mont. Oct. 4, 2011) (approving
 26 Chapter 13 debtor's motion to approve compromise with creditor) (quoting *Woodson v. Fireman's*
 27 *Fund Ins. Co.*, 839 F.2d 610, 620 (9th Cir. 1988)). Here, taking all factors into consideration favors
 28 approval of the Motion and the Settlement Agreement.

29 A. Probability of Success in the Litigation.

30 This factor weighs in favor of approving the Settlement Agreement. The probability of
 31 success in the Parties' pending litigations is uncertain. Although Silverton is confident in the merits
 32 of her claims against Debtor pending in California and Nevada, the pending litigations are

1 currently stayed by the automatic stay. In the first trial, the San Diego Superior Court has already
2 addressed Debtor's breach of his fiduciary duty as trustee of the Trust by the alleged transfer of
3 \$660,000.00 of Trust res to himself, however, that court has not yet made any findings. The court
4 still has not adjudicated damages and other remaining issues from Silverton's Amended Petition.
5 Additionally, any outcome in potential future litigation before this Court regarding the
6 dischargeability of Silverton's claims also remains uncertain.

7 **B. Difficulties, if any, in the Matter of Collection.**

8 This factor does not appear to be applicable given that any collection efforts would be by
9 Silverton against Debtor's estate. If the Settlement Agreement is not approved, Silverton may face
10 several hurdles to collect against Debtor. First, the automatic stay precludes Silverton from
11 currently obtaining a judgment and will preclude Silverton from collecting on said judgment
12 without prior court approval. Second, according to Debtor's Schedules, there is insufficient
13 nonexempt equity to satisfy Silverton's claims in full.

14 **C. Complexity of Litigation Involved, and the Expense, Inconvenience, and Delay**
15 **Necessarily Attending it.**

16 This factor weighs in favor of approving the Settlement Agreement. The claims in the San
17 Diego Litigation are grounded in California probate law. Those claims include application of
18 California law regarding fiduciary duties of a trustee, financial elder abuse, and application
19 California Probate Code § 859's award of double damages. The claims in the Douglas County
20 Litigation are grounded in Nevada law. Those claims include application of Nevada fraudulent
21 transfer and fraud laws.

22 Upon motion and approval of the Bankruptcy Court, the Debtor must obtain California
23 counsel to complete any pending pretrial litigation in the San Diego Litigation and to litigate the
24 trial on Silverton's Amended Petition. The Douglas County Litigation, on the other hand, is in its
25 infancy, with Debtor filing his Answer a month before he filed his petition. The litigation is
26 necessarily complex and fact intensive given the claims at issue, which means the cost of litigation
27 is high. In fact, Silverton has already incurred over \$150,000.00 in legal fees from the San Diego
28 Litigation alone. The Debtor estimates that he has incurred over \$70,000 in prepetition legal fees.

H O L L E Y D R I G G S

1 Silverton asserts claims against Debtor's estate totaling \$2,180,000.00. Because Debtor is
2 proposing a 100% plan to general unsecured creditors, Silverton's claim necessarily affects the
3 administration of the bankruptcy estate. If the Parties do not have an approved Settlement
4 Agreement prior to the § 523 bar date, it is possible that Silverton may commence litigation before
5 this Court to determine the validity, extent, and nondischargeability of Silverton's claim. That
6 possible litigation will require the Parties to incur additional litigation costs that necessarily come
7 with an evidentiary hearing and briefing schedule. Any litigation costs incurred by Debtor will be
8 paid by Debtor's income, which is an estate asset. A compromise that resolves all pending
9 litigation will save the parties expense, delay, and inconvenience associated with continuing
10 prosecution of these matters. Therefore, this factor weighs in favor of approving the Settlement
11 Agreement.

12 **D. The Paramount Interest of Creditors.**

13 This factor weighs heavily in favor of approving the Settlement Agreement. Silverton is
14 the estate's largest creditor. Debtor scheduled a total of \$350,803.66 in general unsecured claims.
15 See Schedule E/F ECF No. 1. Debtor's most recent plan is a 100% plan where Debtor proposes to
16 make \$476,825.00 in plan payments. See ECF No. 28. Debtor also proposes to use an undetermined
17 amount of funds from the sale of his home to make additional payments to fund the Chapter 13
18 Plan. These proposed plan payments include payments to Silverton under the Settlement
19 Agreement. If the Settlement Agreement is not approved, then Debtor would be unable to fund a
20 100% plan given Silverton's \$2.1 million claim. Meaning that creditors would share in a pro rata
21 distribution, well below the 100% proposed distribution under Debtor's current plan. The
22 Settlement Agreement, therefore, ensures that creditors will receive the highest possible
23 distribution while simultaneously resolving highly contested litigation. Therefore, this factor
24 weighs heavily in favor of approving the Settlement Agreement.

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1 **III. CONCLUSION**

2 For the foregoing reasons, Kathryn Silverton and the Debtor respectfully request that the
3 Court (i) grant this joint motion to approve the compromise of claims, and (ii) enter an order
4 approving the Settlement Agreement.

5 Dated this 8th day of March 2024.

6 **HOLLEY DRIGGS**

7 _____
8 /s/ R. McKay Holley
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11 *Attorneys for Kathryn Silverton, trustee and
12 beneficiary of the Loretta M. Kuhn Revocable
Trust*

13 Dated this 8th day of March 2024.

14 **DEMETRAS LAW**

16 _____
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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Holley Driggs and that, on the 8th day of March, I caused to be served a true and correct copy of JOINT MOTION TO APPROVE COMPROMISE UNDER RULE 9019 in the following manner:

(ELECTRONIC SERVICE) Under Local Rule 5005 of the United States Bankruptcy Court for the District of Nevada, the above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by that Court's facilities.

(UNITED STATES MAIL) By depositing a copy of the above-referenced document for mailing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, to the parties listed on the attached service list, at their last known mailing addresses, on the date above written.

(OVERNIGHT COURIER) By depositing a true and correct copy of the above-referenced document for overnight delivery via Federal Express, at a collection facility maintained for such purpose, addressed to the parties on the attached service list, at their last known delivery address, on the date above written.

(FACSIMILE) By serving a true and correct copy of the above-referenced document via facsimile, to the facsimile numbers indicated, to those listed on the attached service list, and on the date written above.

/s/ Olivia Swibies
An employee of Holley Driggs